

STATE OF MICHIGAN
IN THE SUPREME COURT

DIANE BUKOWSKI, and the MICHIGAN CITIZEN,

Supreme Court No.

Plaintiffs-Appellees,

Court of Appeals No. 256893

v

Wayne County Circuit Court
No. 02-242574 CZ

CITY OF DETROIT,

Defendant-Appellant.

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CITY OF DETROIT'S APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

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MICHIGAN SUPREME COURT

APPEAL FROM COURT OF APPEALS' OPINION

The City of Detroit appeals from the Court of Appeals' May 26, 2005 opinion reversing and remanding the trial court's decision, and from the Court of Appeals' July 15, 2005 denial of the City's Motion for Reconsideration. The City of Detroit respectfully requests that this Court grant the City's application for leave to appeal. The trial court and Court of Appeals decisions are attached in Exhibit A.

QUESTION PRESENTED

- I. WHETHER THE COURT OF APPEALS CLEARLY ERRED WHEN IT RULED THAT PURSUANT TO THE FRANK COMMUNICATIONS EXEMPTION TO THE FREEDOM OF INFORMATION ACT, MCL 15.243(1)(m), ADVISORY COMMUNICATIONS AND NOTES WITHIN A PUBLIC BODY WHICH PRECEDE A FINAL AGENCY DETERMINATION MAY BE RELEASED AFTER THE FINAL AGENCY DETERMINATION.

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STATEMENT OF FACTS AND PROCEEDINGS

This appeal arises from the Court of Appeals May 26, 2005 opinion reversing and remanding the decision of the Wayne County Circuit Court. On June 16, 2005, the Defendant-Appellant City of Detroit ("City") filed a Motion for Reconsideration of the Court of Appeals decision. The COA denied the City's Motion for Reconsideration on July 15, 2005, and the City now files this timely Application for Leave to Appeal.

On December 2, 2002, Plaintiffs Diane Bukowski and the Michigan Citizen ("Plaintiffs") sought the release of the Shoulders Report under the Michigan Freedom of Information Act, MCL 15.231 et seq. (hereinafter "FOIA"). Defendant maintained that the Report was privileged and not subject to disclosure pursuant to FOIA sections MCL 15.243(1)(m), and MCL 15.243(1)(s)(ix). The preparation of the Shoulders Report was occasioned by the repeated involvement of one Detroit Police Officer, Eugene Brown, in the shooting incidents.

The Shoulders Report was written by an Executive Board of Review (hereinafter "EBR"), of the Detroit Police Department at the direction of then Police Chief Benny Napoleon and is focused on the conduct of Officer Brown. (See Affidavit, November 6, 2000, Benny Napoleon, formerly Exhibit A to Defendant's Motion for Summary Disposition, June 30, 2003.) On May 1, 2000, Deputy Chief Walter Shoulders was appointed to chair the EBR. (See Affidavit, Walter Shoulders, Exhibit A to Defendant's Motion for Summary Disposition.) The EBR's mission was to "review certain actions of Eugene Brown...and the Police Department's response to those actions." (See Napoleon Affidavit, para. 2.) Shoulders described the Report as containing frank criticism of the Detroit Police Department and some of its executives and employees. (See Shoulder's Affidavit para. 5, p 2.)

The report was intended to be used as a self-critical aid in decision making and policy formulation. Chief Napoleon stated his intention was to use the report “to determine whether disciplinary action should be commenced against Officer Brown or other Detroit police officer(s); and to determine whether there is a need for revision or refinement of departmental policies.” (See Napoleon Affidavit, para 3.) Such a mission requires “frank and thorough self-critical discussion” and as a consequence the EBR report “is maintained as a highly confidential document.” (See Napoleon Affidavit, para. 5.) Chief Napoleon’s affidavit addressed not only the immediate impact of release of this document, but also focused on the long term consequences of breaching the confidentiality of this report. He summarized the long-term impact of the release of this document as follows:

Because of the importance of frank and thorough self-critical discussion in the work of the EBR, the EBR’s file is maintained as a highly confidential document.

If the confidentiality of the EBR’s file could not be assured, then I would not have confidence in the ability of the EBR and Assistant Chief to engage in the vigorous self-critical analysis that is essential to the mission of the EBR. I am not confident that Police Department executives would freely engage in that sort of analysis if they needed to be concerned that their critical comments might be broadcast outside the high executive ranks of the Police Department, especially if there is a danger of those remarks being used to the detriment of the City of Detroit or its employee(s) in civil litigation. Police Department executives must be concerned for the City’s financial well-being, but it is important that their concern for the City’s finances not deter them from engaging in the hard-hitting, frank analysis that I expect from the EBR.

It would pose an even greater danger if executives who sit on the EBR or who review its work need to be concerned that they might be compelled in the course of litigation, to answer questions concerning their findings, conclusions, opinions or recommendations. In that case, executives would be inhibited not only from committing to

writing thoughts that are critical of the department or its members, but even from thinking such thoughts in the first place. It is simply not realistic to expect executives to review the issues being considered by the EBR thoroughly, critically, and objectively while being concerned that their critical and objective thought processes might later be used to impose liability on the City or one of its employees. Subjecting executives to such questioning would encourage a “see no evil, hear no evil, speak no evil” attitude.

(Napoleon Affidavit, paras. 6 and 7.)

Similarly, Jerry Oliver, successor to Benny Napoleon as Chief of Police, echoed Napoleon’s concerns regarding future implications of the release of the Shoulders report, stating that he was doubtful that Detroit Police Department executives would freely engage in self-critical analysis if “there is a danger of those remarks being broadcast outside the high executive ranks of the DPD.” (See Affidavit of Jerry Oliver, p 2, para 5, formerly Exhibit A to Defendant’s Motion for Summary Disposition.)

These affidavits effectively provide a detailed description of the Shoulders report, and its purpose. The affidavits also supply the foundation for the continued confidentiality of the report in order to assure the free flow of ideas and frank, candid discussion within the Detroit Police Department.

Consistent with those concerns, the Defendant has vigorously defended the confidentiality of this report, including resisting demands for its release to the Detroit City Council. (See Order and Opinion Denying Motion for Mandamus, April 25, 2003, City Council v Jerry Oliver, Wayne County Circuit Court No. 99-906156 NO; Order Denying Plaintiff’s Motion to Produce, September 24, 2001, Grable v Eugene Brown, Wayne County Circuit Court No. 02-2185276-AW, formerly Exhibit B to Defendant’s Motion for Summary Disposition.)

One June 6, 2002, Plaintiff Diane Bukowski, a reporter for the Michigan Citizen newspaper, filed a Freedom of Information Act request for a “complete copy of the document known as the ‘Walter Shoulders report’...” (See FOIA Request, June 6, 2002, formerly Exhibit I to Plaintiffs’ Response to Defendant’s Motion for Summary Disposition.) On June 13, 2002, the City of Detroit denied this request stating as follows:

Your request is denied pursuant to MCL 15.243(1)(b)(i) and (ii) for the reason that the report you requested is an investigating record compiled for law enforcement purposes and disclosing the report would interfere with law enforcement proceedings and deprive Officer Brown and others the right to a fair trial or impartial administrative adjudication. Moreover, contained in the Shoulder’s report are communications and notes with a public body of an advisory nature to the extent they cover other than purely factual material and are preliminary to a final agency determination of policy or action. Accordingly, your request is also denied pursuant to MCL 15.243(1)(m).

(See June 13, 2002 letter, formerly Exhibit I to Plaintiff’s Response.)

On December 6, 2002, Plaintiffs filed their complaint. Defendant filed a motion for summary disposition on June 30, 2003. In its motion, Defendant asserted that the Shoulders’ Report was exempt from disclosure pursuant to MCL 14.243(1)(m) (intra-agency or deliberate process exemption), MCL 15.243(1)(b)(i) and (iii) (interference with law enforcement proceedings), and MCL 15.243(1)(s)(ix) (personnel records). Plaintiffs subsequently filed a motion for summary disposition on August 14, 2003.

Oral argument of both motions were held by the trial court on September 9, 2003. At that time the Defendant withdrew its claim of exemption under MCL 15.243(1)(b) (ongoing investigation) because, “at the present time, we do not have any knowledge that there is any law enforcement proceedings that may be interfered with or that would jeopardize any rights to a fair trial

or impartial adjudication of the matter if the Shoulders report were to be released.” (Tr 9/9/03, p 13.)

Thus, oral argument focused on two FOIA exemptions, MCL 15.243(1)(m), the intra-agency communications or deliberative process exemption and MCL 15.243(1)(s)(ix), the personnel records exemption.

Following oral argument, the trial court indicated that it would partially grant both motions.

The Court partially granted Plaintiffs’ motion, reasoning as follows:

Factual summaries that are contained in the Shoulders Report I would agree are not discoverable. But I disagree that because the entire report is not purely factual, that no redaction may take place, because of the plain reading of the statute clearly says that to the extent that they cover other than purely factual materials, a public body may exempt from disclosure a public record under this act. And it’s only to that extent that the City may do so.

So I would rule that all those factual portions of this report may be discovered, and that requires no balancing test. That’s a pure operation of the law.

. . . I’m only turning over the factual information and anything that is evaluative, deliberative, conclusionary, interpretive, is not discoverable. That would include factual findings as not being discoverable because any person inside the process who states in the report that they have found a fact is applying their own logic, and so those matters will also be redacted.

(Tr 9/9/03, pp 39-40.)

The trial court denied Plaintiffs access to the deliberative portions of the report, finding that material to be exempt. (Tr 9/9/03, p 41.) However, the trial court rejected Defendant’s contention that the material was exempt under the personnel record exemption. (*Id.*, pp 35-40.) Following an additional hearing, on June 25, 2004, the trial court entered an order to that effect. The City appealed the Order, and Plaintiffs cross-appealed the trial court’s decision. In April of 2005, the Court of

Appeals held oral argument. On May 26, 2005, the Court of Appeals issued its decision, reversing the trial court's decision and remanding back to that Court. With respect to the personnel file exemption, the COA found that while the trial court correctly articulated the balancing test, the Court did not properly apply the test to determine whether the public interest in disclosure outweighed the interest in non disclosure.

With respect to the deliberative process privilege, the Court of Appeals also found that the lower court incorrectly applied the balancing test of whether "in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure."

Further, the Court also stated that "Plaintiffs argue that, although the Shoulders Report may have been prepared as "preliminary to a final agency determination of policy or action," the frank communications exemption does not apply because there is no evidence that the Shoulders' Report is currently preliminary to any agency determination of policy or action." (Opinion, p 5.) The Court of Appeals then directed the trial court to address this issue on remand. However, later in the opinion, the Court of Appeals stated that "if the Shoulders Report contains communications that are no longer preliminary to an agency determination of policy or action, the frank communication exemption does not apply to these communications." It is this finding which the City challenged when it filed its Motion for Reconsideration, on June 16, 2005. The Court of Appeals denied the motion on July 15, 2005. The City now brings this application for leave to appeal.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF THE FRANK COMMUNICATIONS EXEMPTION UNDERMINES THE PURPOSE BEHIND THE EXEMPTION TO ENCOURAGE A FREE EXCHANGE OF INFORMATION AMONG GOVERNMENT DECISIONMAKERS.

A. Grounds for Leave to Appeal.

The Court of Appeals decision will have a significant impact on the manner in which State and local governments manage FOIA requests, and will render meaningless the existing exemption for documents reflecting the deliberative processes leading up to final decisions. If the Court of Appeals opinion is allowed to stand, the decision will have a chilling effect on all governmental employees involved in the decision making processes, will have a negative impact on governmental decision making, and will serve to undermine the objective of all governmental agencies across the State - good governance. In large measure, the quality of government decision making depends upon the quantity and quality of information available to the decision makers. Unless the Court of Appeals is reversed on this point, the decision will restrict the flow of information available to government decision makers, discourage participants from offering their candid views, and thereby decrease the likelihood that the best decisions will be reached. Accordingly, this appeal raises legally significant issues which should be addressed by the Court.

B. The Court of Appeals Interpretation of the Frank Communications Exemption Undermines the Purpose Behind the Exemption - - to Encourage a Free Exchange of Information Among Government Decisionmakers.

This appeal concerns the frank communications exemption to the Freedom of Information Act, as found in MCL 15.243(1)(m). This section provides as follows:

(1) A public body may exempt from disclosure as a public record under this act:

* * *

(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

When interpreting a statute, the courts are required to ascertain and give effect to “the purpose and intent of the Legislature by examining the provisions in question. The statutory words must be considered in light of the general purpose sought to be accomplished.” People v Smith, 423 Mich 427, 441; 378 NW2d 384 (1985). Statutes should be construed to avoid absurd consequences. King v Midland County, 73 Mich App 252, 258; 251 NW2d 270 (1977). When the particular language of a statute suggests two possible interpretations, and one interpretation would undermine the purpose of the statute, the court should decline to implement the inconsistent interpretation. Energetic, Ltd. v Benchley, 442 Mich 38, 45-46; 497 NW2d 497 (1993).

In light of the clear purpose underlying the frank communications exemption, the Court of Appeals’ interpretation would undermine that purpose. The Michigan Court of Appeals recently discussed the frank communications exemption in Herald Communication, Inc. v Eastern Michigan University, 265 Mich App 185; 693 NW2d 850 (2005). In Herald Communication, the Board of Regents for Eastern Michigan University initiated an investigation of expenditures for the president’s residence at the University. As part of the investigation, one of the board members asked the University’s vice president for his written opinion of the president’s role in the project. Once his review was complete, the vice president forwarded a letter with his findings to the board. Subsequently, the Ann Arbor News made a FOIA request for the letter, which the board denied under

the frank communications exemption. In upholding the Board's decision, the Court of Appeals reiterated that the goal of "FOIA, and its exemption is good government, not disclosure for disclosure's sake." 265 Mich App at 202. In discussing the decision of the board to refuse to release the vice president's letter, the Court stated that "[t]he board needed more than cold and dry data to do its job, it needed the unvarnished candid opinion of insiders to make policy judgments and, particularly, to conduct sensitive investigations of top administrators." 265 Mich App at 202-03.

The Herald Communications decision also discussed the similar exemption found in the Federal Freedom of Information Act statute. Under 5 USC §552(b)(3), the federal statute exempts from disclosure "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency..." This section was discussed in NLRB v Sears, Roebuck & Co, 421 US 132, 150, 95 S Ct 1504, 44 L Ed 2d 29 (1975):

The point, plainly made in the Senate Report, is that the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result . . . 'human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process.'

With respect to the Michigan FOIA exemption at issue, the language in question provides that the exemption applies to "communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action.. . ." To interpret this provision consistent with the purpose of the act, to foster honest and frank discussion in public decision making, the phrase "are preliminary" must refer to the timing of the document's creation as opposed to the timing of the FOIA request.

To read the provision otherwise would undermine the purpose of the act. The Court of Appeals interpretation would mean that public officials and decision makers would now be on notice that their opinions and mental impressions on any given matter are subject to release after the final agency decision or action. Consequently, public officials and those involved in the advisory process, knowing that their opinions would be publicly disclosed, will undoubtedly temper and restrain their remarks accordingly. Thus, instead of facilitating the free exchange of information consistent with the underlying purpose of the act, the Court of Appeals' interpretation would serve to hamper that exchange. This is contrary to the underlying purpose of the exemption, detrimental to the decision making process, and thus, detrimental to good governance.

If allowed to stand, the Court of Appeals decision will have serious and far reaching impacts across the State. State and local governments will have to reevaluate their FOIA policy, and will now be expected to disclose key documents which contain evaluative and deliberative impressions leading up to critical government decisions. Because of the impact which public disclosure is expected to have on those officials involved in government decisions, the Court of Appeals opinion will almost certainly negatively impact the free exchange of information necessary to good governance.

C. At Minimum, Since the Trial Court Never Addressed the Issue of Whether Deliberative Materials May Be Released After a Final Agency Determination, the Issue Should Be Remanded to the Trial Court For Its Decision.

In its opinion, the Court of Appeals noted that "Plaintiff argues that, although the Shoulders Report may have been prepared as 'preliminary to a final agency determination of policy or action,' the frank communications exemption does not apply because there is no evidence that the Shoulders Report is *currently* preliminary to any agency determination of policy or action. We direct the trial

court to address this issue on remand.” (Opinion, p 5) (emphasis in original.) Nonetheless, the Court goes on to state that “if the Shoulders Report contains communications that are no longer preliminary to an agency determination of policy or action, the frank communications exemption does not apply to these communications.” (Opinion, p 6.) Thus, the issue of whether the frank communication exemption applies to a post-decisional request for pre-decisional deliberative materials was not addressed by the trial court, and therefore should not have been addressed by the Court of Appeals.

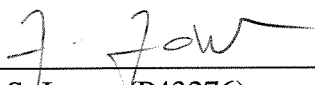
When an issue has not been addressed by a trial court, the issue is not properly presented for appeal. Alan Custom Homes, Inc. v Krol, 256 Mich App 505, 513; 606 NW2d 379 (2003). See also Stanke v State Farm Mutual Automobile Ins, 200 Mich App 307; 503 NW2d 758 (1993) (“we would also decline to address the merits of defendant’s motion for summary disposition in light of the fact that the trial court itself has not yet addressed the merits of defendant’s argument. It would be imprudent for this Court to address the merits of the issue without first affording the trial court an opportunity to do so”.) 200 Mich App at 325. Accordingly, this Court should direct that this matter be remanded to the trial court to first address this issue.

RELIEF REQUESTED

The City of Detroit respectfully requests that this Court grant the City of Detroit's Application For Leave to Appeal.

Respectfully submitted,

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